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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

VIPER CAPITAL MANAGEMENT, *et al.*

Defendants.

AND RELATED ACTIONS

No. C 06-6966 SI

(Related Case Nos. C 06-7270 SI,
C 07-2507 SI, C 07-2508 SI, C 07-2509 SI)

(Formerly: U.S. Bk. Ct. N.D. Cal. Involuntary
Chapter 7 Case Nos. 07-40126T, 07-40129T,
07-40130T)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR ORDER AUTHORIZING
FILING OF HOMESTEAD
DECLARATION (ORIGINALLY FILED
WITH U.S. BANKRUPTCY COURT ON
JUNE 11, 2007)**

Date: July 13, 2007
Time: 9:00 A.M.
Place: 450 Golden Gate Ave.
San Francisco, CA
Courtroom 10
Judge: Hon. Susan Illston

The undersigned hereby refiles the attached document originally filed with the U.S.
Bankruptcy Court N.D. Cal. on June 11, 2007.

DATED: June 26, 2007

/s/ James D. Wood

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Attorney for Debtor EDWARD S. EHEE

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
EDWARD SEWON EHEE,
Debtor.

Case No. 07-40126T
(Involuntary Chapter 7)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
EDWARD EHEE'S MOTION FOR
ORDER AUTHORIZING FILING OF
HOMESTEAD DECLARATION**

Hearing:

Date: July 5, 2007
Time: 3:00 P.M.
Place: 1300 Clay Street
Oakland, CA
Courtroom 201
Judge: Hon. Leslie J. Tchaikovsky

EDWARD SEWON EHEE ("Ehee" or "Debtor"), submits the following memorandum of points and authorities in support of the above-captioned motion (the "Motion"):

I. INTRODUCTION

Ehee and his wife (the "Ehees") own their home in Oakland. It is apparently undisputed that Ehee has hundreds of thousands of dollars of equity in that home. The various parties with whom Ehee is entangled in litigation are urging Ehee to sell his home because they believe if Ehee does not do so, the property will be lost to foreclosure -- a foreclosure sale was stayed by

1 the commencement of this case. To protect the equity and to preserve the status quo with respect
2 to the various parties legal rights, Ehee also wants to sell the property.

3 The Ehees both owned and occupied the home beginning well before the commencement
4 of this involuntary bankruptcy and have continued to do so at all times since then¹. Were an order
5 for relief in the case entered today, Ehee would be entitled to claim a homestead exemption in the
6 property. But due to the unsettled state of the law governing the right to claim an exemption in
7 the proceeds of otherwise exempt property disposed of during the period between the date of an
8 involuntary petition and the date of an order for relief (commonly referred to as the "gap" period),
9 Ehee risks losing the exemption unless he records a homestead declaration with respect to the
10 property before selling it. But, again due to the unsettled state of the law, it is unclear whether
11 Ehee may validly record a homestead declaration without this Court's permission. Hence, Ehee
12 seeks this Court's permission to do so because, in the unusual circumstances of this case,
13 authority for recording a homestead declaration will permit the preservation of the status quo
14 rather than the alteration of the substantive rights of the parties.

17 II. FACTS

18 On November 8, 2006, the Securities and Exchange Commission ("SEC") filed an action
19 against Ehee and others alleging violations of the federal securities laws alleging in substance that
20 Ehee made various false representations to securities investors. *Securities & Exchange*
21 *Commission v. Viper Capital Management, LLC, et al.* (U. S. Dist. Ct. N.D. Cal. Case No. C-06-
22 6966-SI) (the "SEC Action"). On November 22, 2006, the district court entered a stipulated
23 preliminary injunction, thereby extending a prior temporary restraining order, among other things,
24 prohibiting Ehee from disposing of assets except under conditions authorized by the injunction
25

26
27 ¹ The facts recited herein regarding the procedural status of this and related cases is based upon
28 the petition commencing this case and the motions pending therein. Clerk's Dock. Nos. 1, 13,

1 (the "District Court Injunction"). Thereafter, on November 22, 2006, Roosevelt Fund, L.P.
2 ("Roosevelt") also filed an action against Ehee and others asserting various claims under the
3 securities and other laws alleging in substance that it had incurred substantial losses as a result of
4 false representations made by Ehee. *AAG Roosevelt Fund, L.P. v. Edward Sewon Ehee, et al.*, U.
5 S. Dist. Ct. N.D. Cal. Case No. C-06-7270 SI (the "Roosevelt Action"). Roosevelt then
6 commenced this and two related involuntary bankruptcy cases by filing petitions on January 12,
7 2007. Ehee has denied the substantive allegations against him contained in the SEC Acton and
8 the Roosevelt action and has opposed the petition against him. No order for relief has been
9 entered in this case.
10

11 Ehee and his wife own their home located at 6122 Acacia Ave., Oakland, California (the
12 "Acacia" Property"). The SEC contends that the Acacia Property probably constitutes the only
13 significant source of potential recovery by investors to whom it asserts Ehee is liable. The Acacia
14 Property is now subject to non-judicial foreclosure proceedings which have been stayed by the
15 pendency of this involuntary case. The District Court Injunction contains provisions authorizing
16 the Ehees to sell the Acacia Property subject to certain restrictions, principally that the SEC be
17 notified of any proposed sale in advance, and that the proceeds thereof be deposited with the
18 registry of the district court. Both the SEC and Roosevelt have urged the Ehees to aggressively
19 market the Acacia property lest it be foreclosed and the Ehees' equity thereby made unavailable to
20 Ehee's alleged investor creditors.
21

22 Ehee also desires to market the property and does not oppose the deposit of any proceeds
23 of a sale with the registry of the district court pending resolution of the litigation against him.
24 Ehee would be entitled to assert an exemption in the Acacia Property if an order for relief under
25 Bankruptcy Code Sect. 303 were entered today under California's automatic homestead
26
27

28 25-26. The Debtor's occupancy of the property at issue is established by the Declaration of

provisions. But, as detailed below, unless Ehee is permitted to record a homestead declaration prior to selling the Acacia Property, he risks losing that exemption if an order for relief under Sect. 303 is entered after a sale of the Acacia Property. Hence, Ehee submits that the effect of granting the relief he seeks will be to preserve the status quo².

III. RELIEF REQUESTED

As stated in the Motion, Ehee seeks an order:

1. Authorizing he and/or his wife to record a homestead declaration pursuant to California Code of Civil Procedure Sects. 704.910-704.995 for the Acacia Property.
2. Such order, if entered, shall expressly recognize that nothing in such order purports to modify, limit, override, construe, interpret, or diminish the effect of the District Court Injunction.

IV. ARGUMENT

A. The Court Should Authorize Ehee to Record a Homestead Declaration

This Motion is necessitated by the unusual intersection of several legal issues. But, in spite of the apparent novelty of the precise circumstances of this case and the unsettled state of various legal issues discussed below, the Court should grant Ehee the relief he requests because to do so operates to preserve the status quo and to protect property of the estate from loss by foreclosure without prejudicing the rights of any creditors or other third parties.

1. **If an Order for Relief is Entered and if Ehee Does Not First Sell the Acacia Property, He Will Be Entitled to Assert the "Automatic" Homestead Exemption Even Without Recording a Homestead Declaration**

California law contemplates two types of homestead exemption. The first, the "automatic" homestead, arises solely from the occupancy of a dwelling owned by the debtor and

Edward Ehee dated May 25, 2007 filed herewith.

² There is no specific proposed sale pending at this time. However, Ehee believes that the homestead exemption issue is a factor complicating and impeding efforts to market the Acacia Property. If the relief requested herein is granted by the Court now, Ehee need not condition closing of a future sale upon obtaining such relief.

1 eligible family members. Cal. Civ. Pro. Code Sect. 704.710 *et seq.*. The second, the "declared"
 2 homestead, exists only where a declaration of homestead has been properly recorded. Cal. Civ.
 3 Pro. Code Sect. 704.910 *et seq.* Both forms of homestead are recognized as properly claimable as
 4 exemptions in bankruptcy cases. It is beyond doubt that if the Court enters an order for relief and
 5 the Ehees still occupy the Acacia Property as of the entry of such an order, Ehees will be able to
 6 properly claim the automatic homestead exemption.
 7

8 **2. If Ehees Sell the Acacia Property During the Gap Period Without First**
 9 **Recording a Valid Homestead Declaration, Ehees Risk Losing his Entitlement**
 10 **to Assert the Homestead Exemption**

11 If Ehees's right to claim bankruptcy exemptions is measured as of commencement of the
 12 bankruptcy case, then he is entitled to claim an automatic homestead even if he sells the property
 13 during the gap period. But, California's "automatic" homestead exemption does not protect the
 14 proceeds of a voluntary sale of the homestead property. Cal. Civ. Pro. Code Sect. 704.720
 15 (proceeds exemption for automatic homestead limited to forced sale and for proceeds of damage
 16 or destruction); *In re Knudsen*, 80 B.R. 193 (Bk. C.D. Cal. 1987) (no exemption of proceeds for
 17 automatic homestead). Hence, if Ehees must rely solely upon the automatic homestead exemption,
 18 and if his right to claim bankruptcy exemptions is measured as of the date an order for relief is
 19 entered, then he would lose his entitlement to assert a homestead exemption by voluntarily selling
 20 the property during the gap period.
 21

22 Unfortunately, the law is unsettled as to whether, in an involuntary case, exemptions are
 23 fixed as of the date of the commencement of the case or as of the date of the entry of an order for
 24 relief. Most, but not all courts to examine the issue have held that exemptions are measured as of
 25 the order for relief and that debtors may record homestead declarations, etc. during the gap
 26 period. *In re Andreotti*, 16 B.R. 28 (Bk. E.D. Cal. 1981); *In re Gaudreault*, 315 B.R. 1 (Bk. D.
 27 Mass. 2004), *In re Hodes*, 287 B.R. 561 (D. Kan. 2002), *In re Wilson*, 62 B.R. 43, 45-46 (E.D.
 28

1 Tenn. 1985). *Contra: In re Pancratz*, 175 B.R. 85 (Bk. D. Wyo. 1994) (exemption defined as of
 2 petition date). The issue usually arises where the debtor seeks to apply exemptions as of the date
 3 of the order for relief so as to obtain the advantage of a post-petition events, such as the
 4 declaration of a homestead, etc. The courts that have held the date of the order for relief is
 5 controlling also generally agree that debtors are authorized to make gap period changes, claims,
 6 etc. that may perfect or enlarge their exemptions. The Ninth Circuit's pronouncements favor
 7 measurement of exemptions as of the date for the order of relief and to permit actions taken by
 8 debtors during the gap period such as the recordation of homestead declarations. But it has not
 9 squarely addressed the issue. See *First Beverly Bank v. Adeeb (In re Adeeb)*, 787 F.2d 1339,
 10 1346 (9th Cir. 1986) (citing *Andreotti* with approval for the proposition that it would be
 11 inequitable to use the date the petition was filed in an involuntary case for purposes of
 12 determining whether a debt should be discharged); *In re Michael*, 49 F.3d 499 (9th Cir. 1995) and
 13 *In re Michael* 163 F.3d 526 (9th Cir. 1998)³.

14 In spite of weight of authority favoring a debtor's right to file a post-petition homestead
 15 declaration, the foregoing cases illustrate that the issue is still unsettled. Due to the uncertainty of
 16 the law, if Ehee must rely upon the "automatic" homestead exemption, he risks losing his
 17 homestead exemption if he voluntarily sells the Acacia Property.

18 ³ In *In re Michael*, the voluntary chapter 7 debtors failed to file a homestead declaration required
 19 under applicable Montana law until after filing their petition. In an unpublished decision, the
 20 bankruptcy court initially held that a trustee's strong arm powers under Sect. 544 defeated a post-
 21 petition homestead declaration. The Ninth Circuit rejected the applicability of Sect 544 to the
 22 issue and vacated and remanded the case. *In re Michael*, 49 F.3d 499 (9th Cir. 1995). Thereafter,
 23 the Bankruptcy Court again held that the debtors could not rely upon the post-petition recordation
 24 of a homestead declaration relying in part upon the proposition that a post-petition homestead
 25 declaration violates the automatic stay. *In re Michael*, 183 B.R. 230 (Bk. D. Mont. 1995)
 26 (disapproving a proposed compromise of the issue) and *In re Michael*, 185 B.R. 830 (Bk. D.
 27 Mont. 1995) (disallowing the claimed homestead exemption). The Ninth Circuit reversed the
 28 latter decision on the basis that its earlier decision was law of the case. In doing so, it did not
 reach the merits of the bankruptcy court's holding that a post-petition homestead declaration
 violates the automatic stay. *In re Michael*, 163 F.3d 526 (9th Cir. 1998) *rev'g*, 185 B.R. 830.

1 3. **If Ehee Records a Valid Homestead Declaration Prior to Selling the Acacia**
 2 **Property, His Right to Assert a Homestead Exemption in the Proceeds of Sale**
 3 **Will be Preserved**

4 Unlike California's "automatic" homestead exemption, a valid "declared" homestead
 5 protects the proceeds of the voluntary sale of the property, at least for a limited time. Cal. Civ.
 6 Pro. Code Sect. 704.960(a). Hence, if Ehee records a valid homestead declaration prior to selling
 7 the property during the gap period, the homestead exemption rights will attach to the proceeds of
 8 the sale without regard to whether bankruptcy exemptions are measured as of the petition date (in
 9 which case the "automatic" homestead exemption applies) or as of the date of the order for relief
 10 (in which case the "declared" homestead will apply to the proceeds of the sale of the property).

11 4. **If Ehee Records a Homestead Declaration in the Gap Period Without this**
 12 **Court's Authorization, He risks Losing The Homestead Exemption Due to the**
 13 **Potential Invalidity of Such Declaration**

14 Under Bankruptcy Code Sect. 303(f), during the gap period, notwithstanding Bankruptcy
 15 Code Sect. 363, a debtor in an involuntary is permitted to use, acquire, or dispose of property in
 16 as if no bankruptcy case were pending. But, under Bankruptcy Code Sect. 549(a)(2) and (b)
 17 subsequent to an order for relief and subject to certain limitations, a trustee may avoid various
 18 transactions, "authorized only under section 303(f)". Moreover, it may be argued that the
 19 recordation of a homestead declaration in the gap period violates the automatic stay and/or the
 20 bankruptcy court's exclusive jurisdiction over property of the estate. The law in the Ninth Circuit
 21 appears to be that an involuntary debtor may take steps during the gap period which result in the
 22 alteration or enhancement of exemption rights. See Part IV(A)(2) of this memorandum. But, as
 23 discussed above, the law is unsettled on this issue. If during the gap period, Ehee records a
 24 homestead declaration without this Court's express authority and then sells the Acacia Property,
 25 he risks losing the automatic homestead exemption to which he is otherwise entitled due to the
 26 potential invalidity of the declared homestead.
 27
 28

1 **5. Ehee Cannot Prudently Sell the Property So Long as Doing So Risks Loss of**
 2 **the Homestead Exemption**

3 It is obvious that Ehee cannot prudently sell the property if doing so risks the loss of the
 4 homestead exemption to which he is otherwise entitled.

5 **6. Ehee Cannot Prudently Sell the Property Without First Obtaining the Court's**
 6 **Permission to Record a Homestead Declaration**

7 For the reasons specified above, Ehee cannot prudently sell the property unless this court
 8 grants him permission to record a homestead declaration.

9 **7. To Facilitate Sale Of The Property, and Thereby to Preserve the Status Quo,**
 10 **the Court Should Authorize Ehee to Record a Homestead Declaration.**

11 Those courts that have disapproved of debtors' post-petition actions which have the effect
 12 of altering or modifying exemption rights have reasoned that such actions violate either the
 13 automatic stay or the bankruptcy court's exclusive jurisdiction over property of the estate. They
 14 further reason that the commencement of a bankruptcy case effectively freezes exemptions in
 15 place at the commencement of the case. *See, e.g., In re Michael*, 185 B.R. 830 (Bk. D. Mont.
 16 1995) *rev'd* 163 F.3d 526 (9th Cir. 1998)⁴ and *In re Robbins*, 187 B.R. 400 (Bk. D. Mass. 1995).
 17 It therefore follows that even if the courts that have so held are correct, it is within a bankruptcy
 18 court's discretion to permit under Sect. 363 transactions that would otherwise be unauthorized. In
 19 this case, the Court should do so because such action does nothing more than promote the
 20 preservation of the status quo with respect to the homestead exemption while simultaneously
 21 eliminating the risk that the debtor's equity in the property will be lost to both he and his creditors
 22 through foreclosure.
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28 ⁴ See footnote 3 above discussing *In re Michael*.

